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IN THE

Supreme Court of the United States

October Term, 1957

No. 423

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Petitioner,

vs.

EDWARD T. HYDE,

Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

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STATEMENT

Petitioner's statement is entirely inadequate and also misleading. The District Court twice heard the motion to transfer under 28 *U.S.C.A.*, Sec. 1404(a), and, as the district judge's certificate shows, considered all pertinent factors in reaching his decision. A considerable portion of both petitioner's and respondent's arguments in the Court of Appeals were devoted to a discussion of the merits of the District Court's order to transfer. All factors affecting the merits of the order to transfer were entirely eliminated from

the case by the decision of the Court of Appeals holding that it lacked jurisdiction to consider the merits and that it denied petitioner's petition solely upon the ground of lack of jurisdiction to grant either mandamus or prohibition to review the transfer order of the District Court.

The question presented by petitioner's petition to this Court thus presents only the question whether the Court of Appeals has jurisdiction to review a transfer order made under 28 *U.S.C.A.*, Sec. 1404(a), regardless of the merits. The distinction between "jurisdiction" and "merits" is not only a fundamental one, but also one which this Court has long recognized and enforced. The decisions of this Court settle the rule that "jurisdiction" is the power, conferred by law, to hear and determine a case and that "merits" consist of the various elements of which enter into or qualify plaintiff's right to the relief sought. Implicit in the rule is the principle that "jurisdiction" never depends upon the "merits" of the case brought into court and that "jurisdiction" so defined includes the power to decide cases regardless of their "merits." In fact, the very purpose of exercising "jurisdiction" is to determine the "merits" of a given case.

General Inv. Co. v. New York Cent. R. Co., 271 U.S. 228, 46 S.Ct. 496, 70 L.Ed. 920.

Binderup v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 496, 68 L.Ed. 308.

Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 451, 52 L.Ed. 1039.

As said in 14 *Am. Jur., Courts*, Sec. 161, pp. 364-365:

"Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity (right) to be enforced or the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely con-

sistent with a denial of any equity (right), either in the plaintiff or in anyone else."

A more correct and accurate statement of the question presented by the petition, in view of the decision and proceedings in the Court of Appeals and also of the legal implications of what is comprehended in and implicit of the jurisdictional question raised thereby, is:

> Does a United States Court of Appeals have jurisdiction to grant either mandamus or prohibition to review an order of the United States Court transferring the place of trial from one district to another, where such transfer order is not appealable and is consequently an interlocutory one?

Such a statement serves the purpose of eliminating extraneous questions relative to the merits, which have nothing at all to do with those pertaining to jurisdiction and at the same time to present to the Court the question in such shape that only those matters relevant thereto will be considered.

STATUTES INVOLVED

Petitioner has not mentioned as among the statutes involved:

28 *U.S.C.A.*, Sec. 1691.

28 *U.S.C.A.*, Sec. 1692.

Rule 73, *Federal Rules of Civil Procedure*, should be considered with these statutes. Thus, not only the statutes mentioned by petitioner but also those mentioned above as well as Rule 73 are involved. Sufficient reference thereto is made herein where same are discussed.

CASES DEEMED CONTROLLING OR APPOSITE

Courts of appeal do not have jurisdiction to issue mandamus or prohibition to review change of venue orders made under Sec. 1404(a).

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185.

Clayton & Warlick, 4 Cir., 232 F.2d 699.

In re Josephson, 1 Cir., 218 F.2d 174.

Prohibition should not issue to review an interlocutory order.

Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110.

U. S. v. Hoffman, 4 Wall. 158, 18 L.Ed. 354.

Mandamus should not issue to review an interlocutory order.

Carr v. Donohue, 8 Cir., 201 F.2d 426.

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379.

ARGUMENT

I.

THE UNITED STATES COURTS OF APPEALS HAVE JURISDICTION ONLY OF APPEALS FROM "FINAL DECISIONS OF THE DISTRICT COURTS" UNDER 28 U.S.C.A., SECTIONS 1291 AND 1292, AND RULE 73, FEDERAL RULES OF CIVIL PROCEDURE.

This elementary proposition of law apparently is not disputed, but it is obscured by the petitioner's argument.

Section 1291 is explicit—it provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

Section 1292 is equally explicit in enumerating the appealable interlocutory decisions, which are:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts of the judges thereof determining the right and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;
>
> (4) Judgments in civil actions for patent infringement which are final except for accounting."

An "interlocutory order" is not a "final decision" and consequently is not appealable under the statutes and the rule.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185.

Transfer orders of place of trial, including such orders made under 28 *U.S.C.A.*, Sec. 1404(a), are not appealable for the reason that such orders are interlocutory in character.

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106. (Order made under Sec. 1406(a).)

In re Josephson, 1 Cir., 218 F.2d 174.

Ford Motor Co. v. Ryan, 2 Cir., 182 F.2d 329.

Clayton v. Warlick, 4 Cir., 232 F.2d 699.

Ex parte Chas. Pfizer & Co., 5 Cir., 225 F.2d 720.

Carr v. Donohue, 8 Cir., 201 F.2d 426.

Petitioner proceeded in the Court of Appeals upon the assumption that the transfer order made by the District Court was not appealable. It alleged in paragraph XVI of the petition for mandamus or prohibition in the Court of Appeals (Record below at p. 73):

> "That this petition for a writ of mandamus and for a writ of prohibition is made to this court for the reason that no statutory appeal lies from the said order of the United States District Court, District of Minnesota, Third Division, granting plaintiff's alternative motion to transfer the venue of said action to the United States District Court, Northern District of California, under Section 1404(a) of the United States Judicial Code, and denying defendant's motion to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, * * *"

Thus, petitioner not only admitted the rule as to the appealability of transfer orders under Section 1404(a) to be as we have stated it, but also should now be precluded from taking a different position with respect thereto.

II.

A UNITED STATES COURT OF APPEALS DOES NOT HAVE JURISDICTION UNDER THE ALL WRITS STATUTE (28 U.S.C.A., SEC. 1651) TO GRANT WRITS OF MANDAMUS AND PROHIBITION TO REVIEW NON-APPEALABLE OR INTERLOCUTORY ORDERS OF THE UNITED STATES DISTRICT COURTS, TRANSFERRING THE PLACE OF TRIAL MADE UNDER SECTION 1404 (a).

So far as here pertinent Section 1651(a) provides:

> "* * * all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Mandamus does not lie according to well settled usages and principles of law to review and set aside an interlocutory decision of a District Court.

The cases cited below establish beyond question that an order to transfer under Section 1404(a) made on a motion is an interlocutory order. The rule is established by all the decisions of the Supreme Court of the United States, including its first, last and all intermediate pronouncements upon the question and also by the decisions of this Court, which has not only consistently, but also correctly followed those decisions. We shall cite only some of the cases, but at the same time shall cite some standard texts where these decisions are collected in a veritable array of authority.

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106;

Ex parte Collett, 337 U.S. 55, 69 S.Ct. 994, 98 L.Ed. 1207;

Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041;

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185;

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379;

United States v. Lawrence (1795), 3 Dall. 42, 1 L.Ed. 502;

Carr v. Donohue (8 Cir.), 201 F.2d 426;

Larsen v. Nordbye (8 Cir.), 181 F.2d 765;

United States v. Nordbye (8 Cir.), 75 F.2d 744;

United States, etc., v. Maine Potato Growers, etc., 88 F.2d 780, 66 U.S. D.C. App. 398.

The authorities are collected in 35 *Am. Jur., Mandamus*, Secs. 258-259.

The case of *United States v. Lawrence*, supra, decided in 1795, was the first one to come before the Supreme Court of the United States in which it was sought, as here, to compel a district judge to decide a case in a particular way. In that case Judge Lawrence had by an order decided that the evidence presented to him was insufficient to authorize the issuance of a warrant to seize a ship. In holding that mandamus would not lie, the Court said (4 Dall. 53, 1 L.Ed. 507):

> "We are clearly and unanimously of the opinion that a *mandamus* ought not to issue. It is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain *Barre:* and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own."

In *Bankers Life & Casualty Co. v. Holland*, supra, this Court reviewed many of its prior decisions. In that case the Court granted an order of severance and transfer of the case as to one defendant on the ground that the venue laid was improper as to-wit. The Court said (346 U.S. 382-383, 74 S.Ct. 147-148):

"The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C., Sec. 1561(a), 28 U.S.C.A., Sec. 1651(a). As was pointed out in Roche v. Evaporated Milk Ass'n (1943), 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185, the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. Ex parte American Steel Barrel Co. (1913), 230 U.S. 35, 45-46, 33 S.Ct. 1007, 1010, 1011, 57 L.Ed. 1379; Ex parte Roe (1914), 234 U.S. 70, 73, 34 S.Ct. 722, 723, 58 L.Ed. 1217. Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, Roche v. Evaporated Milk Ass'n, supra, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs

> Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in De Beers Consolidated Mines v. United States (1945), 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566. This is not such a case."

The Court further pointed out that the statutes defining the cases in which the Courts of Appeal have jurisdiction not only excluded by the clearest implication a right of review in other cases by other writs, such as mandamus, but also that the Congress must have contemplated that the District Courts might commit error by interlocutory orders and that such errors were to be reviewed and corrected by appeal only in the cases where the statutes authorized such appeals. The other decisions of the Supreme Court cited above use language similar to that which we have just quoted above from the *Bankers Life & Casualty* case.

In the case of *Carr v. Donahue*, supra, the Court held that mandamus and prohibition should not be issued to prevent a district judge from transferring under Section 1404(a) an act commenced in the United States District Court.

In the case of *Larsen v. Nordbye*, supra, the Court held that writ of mandamus would not issue to compel a district judge to permit the plaintiff, in an action commenced in the District Court, to dismiss without prejudice after the Court had ordered the case transferred from the District of Minnesota to the Southern District of Iowa. The Court said (181 F.2d 766):

> "It (a writ of mandamus) may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers or officers to

whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision."

Prohibition does not lie according to well settled usage and principles of law to review and set aside an interlocutory decision of a District Court.

This rule is well settled. It makes no difference in the application of the rule whether the petitioner claims that the trial judge erred or whether the appellate court is of the opinion that error actually occurred below.

Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110;
U. S. v. Hoffman, 4 Wall. 158, 18 L.Ed. 354;
42 *Am. Jur., Prohibition*, Sec. 30, pp. 165-166;
73 *C.J.S., Prohibition*, Sec. 10, pp. 30-31;
50 *C.J., Prohibition*, Sec. 18, pp. 662-663.

Mr. Justice Miller, speaking for the Court in *U. S. v. Hoffman*, supra, aptly said (18 L.Ed. 355):

> "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; * * *."

The pertinent part of the text in 42 *Am. Jur., Prohibition*, Sec. 30, supra, reads (42 *Am. Jur.*, pp. 165-166):

> "* * * or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review *to undo* what already has been done."

Prohibition does not lie here for the reason that to do so would be to use the write as an interlocutory appeal from an interlocutory order for the purpose of reviewing such order

after it has become final. This would be directly contrary to well settled usage and legal principles and consequently contrary to the express provisions of 28 *U.S.C.A.*, Sec. 1651, the All Writs Act.

Mandamus does not lie to review or reverse an interlocutory decision of a district judge or to decide a case differently from what he has already done.

Mandamus cannot be used as an interlocutory appeal to review interlocutory orders. The granting of a writ of mandamus to compel a district judge to vacate an order made by him or to decide a motion in a particular way contrary to what he has already decided would be not only an interlocutory review of an interlocutory decision not authorized by law, but also would be a substitution by the appellate court of its views for those of the trial court with respect to a matter committed by law to the trial court for its exclusive decision.

In *Roche v. Evaporated Milk Ass'n*, supra, the United States Court of Appeals, by mandamus, ordered the District Court to reinstate certain pleas in abatement, which the District Court had ordered stricken by an interlocutory order, and then to hear and decide such pleas. Mr. Chief Justice Stone, speaking for this Court, said (319 U.S. 25-26, 63 S.Ct. 941):

> "The common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. Ex parte Republic of Peru, supra, 63 S.Ct. 797, and cases cited; Whitney v. Dick, 202 U.S. 132, 136, 140, 26 S.Ct. 584, 586, 587, 50 L.Ed. 963. Hence the question presented on this record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate, we look to those principles which should guide judicial discretion in the use of an extraordinary

remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; *and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.*" (Emphasis supplied.)

The Court further said, as did this Court in *Carr v. Donohue*, supra, at 201 F.2d 428 (139 U.S. 27-30, 63 S.Ct. 942-944):

"Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been subscribed or to review an appealable decision of record. * * * citing cases * * *. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts. 28 U.S.C., Sec. 225(a), 28 U.S.C.A., Sec. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the

same cause might come before this Court many times, before there would be a final judgment.' * * * (Citing cases.) * * *"

In the case of *Ex parte Steel Barrel Company*, supra, where the Supreme Court of the United States denied a writ of mandamus to compel a judge of the Court of Appeals to vacate an order designating a district judge to hear and decide a matter in bankruptcy, Mr. Justice Lurton, speaking for the Court, said (230 U.S. 46, 57 L.Ed. 1384):

> "Judge Lacombe was clearly called upon to determine, in the exercise of his jurisdiction as the senior circuit judge, whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under Sec. 14 of the new Judicial Code, and we cannot compel him, through a writ of mandamus, to undo what has thus been done. Ex parte Burtis, 102 U.S. 238, 26 L.Ed. 392; Re Parson, 150 U.S. 150, 37 L.Ed. 1034, 14 Sup.Ct.Rep. 50."

In *United States v. Nordbye* (8 Cir.), 75 F.2d 744, this Court denied a writ of mandamus to compel a district judge to allow an appeal. The Court said (75 F.2d 745):

> "Mandamus is ordinarily a remedy for official inaction, and not to compel the undoing of acts already done, or to correct wrongs already perpetrated."

The effect of granting the writ here would not only be to "undo" what Judge Bell has decided, but also for this Court to decide a question which Section 1404(a) has committed to Judge Bell as a district judge for his decision.

In the case of *Ex parte Newman*, 14 Wall. 152, 20 L.Ed. 877, the Court held that mandamus would lie to compel a lower court to take jurisdiction of a case and to exercise judicial power and discretion; but "without any direction as to the manner in which it shall be done."

The views above expressed have been adopted as the rule of this Court.

Hydraulic Press Mfg. Co. v. Moore (8 Cir.), 185 F.2d 800;

Carr v. Donohue, supra;

United States v. Nordbye (8 Cir.), 75 F.2d 744;

Federal Savings & Loan Ass'n v. Reeves (8 Cir.), 148 F.2d 731.

The decision of the Court of Appeals in the instant case is in accord not only with the prior decisions of this Court, but also the decision in the subsequent case of *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249, 77 S.Ct. 309.

It appears from what we have said *supra* that the decision of the Court of Appeals in the instant case is in full accord with the views of this Court in prior cases. We should not do more than state that it follows such cases as *Bankers Life & Casualty Co. v. Holland*, supra, and the numerous decisions of this Court there cited.

The decision in the *LaBuy* case is not only not inconsistent with the decision of the Court of Appeals in the instant case, but on the contrary expressly recognizes the correctness of the rule applied below by stating that the rule of the *LaBuy* case was limited to the preliminary matter of compelling a district judge to exercise jurisdiction possessed by him and not to lay down a rule authorizing review by mandamus or otherwise of interlocutory orders for change of venue. As to the application of the rule as one merely compelling a judge to exercise jurisdiction the Court said (77 S.Ct. 313); Judge LaBuy's acts:

> "* * * amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

In making clear that the rule of the *LaBuy* case was not intended to be applied in *venue* cases this Court said (77 S.Ct. 314):

> "It is claimed that recent opinions of this Court are to the contrary. Petitioner cites Bankers Life & Casualty Co. v. Holland, 1953, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106, and Parr v. United States, 1956, 351 U.S. 513, 76 S.Ct. 912. *The former case did not concern rules promulgated by this Court but, rather, an Act of Congress; the venue statute.*" (Emphasis supplied.)

This Court issued a caveat to both the bench and the bar in *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 594, that there was no basis for assuming that mandamus and prohibition would lie in cases like the instant one. There the Court said (349 U.S. 33):

> "Since we find that the district judge properly construed Sec. 1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is a proper remedy."

III.

THE DECISION IN THE INSTANT CASE SHOULD NOT BE REVIEWED BY CERTIORARI FOR THE REASON THAT IT IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioner miscounts the Courts of Appeals which it claims holds contra to the decision in the instant case by the United States Court of Appeals for the Eighth Circuit. The Fifth Circuit is now in accord with the Eighth Circuit and the First and Fourth.

Ex parte Chas. Pfizer & Co., 5 Cir., 225 F.2d 720.

The Court of Appeals for the First Circuit made its position more emphatic by holding that it would decline to consider petitions for writs under Section 1651 to review non-appealable interlocutory orders in an opinion by Chief Judge Mag-

ruder in the case of *In re Sylvania Electric Products*, 1 Cir., 220 F.2d 423, where it said (220 F.2d 424):

> "In several recent cases we have done what we could to discourage the loose filing of applications to us under 28 U.S.C., Sec. 1651. In re Chappell & Co., Inc., 1 Cir., 1953, 201 F.2d 343; In re Previn, 1 Cir., 1953, 204 F.2d 417; In re Josephson, 1 Cir., 1954, 218 F.2d 174. In the last-named case we said, 218 F.2d at page 177:
>
> > "'Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C., Sec. 1651, grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice.'"

We submit that this Court should follow the rule as there stated.

There is no good reason for reviewing a decision, which is correct as a matter of law. Review is for the purpose of correcting error. It would be inappropriate to grant review where none is needed.

The respondent here should not be burdened with the expense incident to review in this Court where such review would serve no good purpose in the case. If it is important to resolve the conflict that exists among the Circuit Courts of Appeals, as petitioner urges, it will be time enough to do so when a case involving error with respect to this question is presented for review.

CONCLUSION

The granting of certiorari here would not bring up for review a decision which should be reviewed for probable error, but, on the contrary, it would needlessly review a decision which is correct. In such a case the Court should decline to issue a writ.

Respectfully submitted,

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